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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re H.C. et al., Persons Coming Under the  
Juvenile Court Law.

SAN MATEO COUNTY HUMAN  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

J.L.,

Defendant and Appellant.

A147479

(San Mateo County  
Super. Ct. Nos. 83675, 83676, 83677)

J.L. (Mother) appeals from orders terminating her parental rights to A.C. (born August 2012) and G.C. (born June 2008), and finding with respect to H.C. (born December 2006) that termination would not be detrimental and there was a probability he would be adopted.<sup>1</sup> Mother challenges the juvenile court's findings that H.C. and G.C. were adoptable and that the beneficial sibling relationship exception did not apply. We reject Mother's contentions and affirm.

<sup>1</sup> We refer to the three children collectively as Minors.

## FACTUAL AND PROCEDURAL BACKGROUND

In April 2014, the San Mateo County Human Services Agency (Agency) filed dependency petitions for Minors under Welfare and Institutions Code section 300.<sup>2</sup> The petitions alleged Mother had been diagnosed with major depression, bipolar disorder, and traumatic stress disorder; had a history of substance abuse; and had shown an increasing pattern of vacillating between ignoring most of Minors' requests for food and "yelling at, cursing at, . . . and hitting" Minors.<sup>3</sup>

The detention report noted Mother's "significant mental health diagnosis" and stated, "it appears as if she is decompensating as evidenced by her reported flat affect, anti-social behaviors, and no positive engagement with her children." The report described concerns about providing adequate food for Minors; excessive discipline including hitting Minors with her hand, a hanger, or a belt; and the use of inappropriate and emotionally damaging language with Minors. At the detention hearing, Minors were detained out of Mother's custody.

Minors were initially placed together in a foster home, but G.C. was removed in late April at the foster parent's request because of her "excessive tantrums." In late May, G.C.'s new foster parent requested she be moved because of behavioral issues including hitting and screaming. All three Minors were moved to a new placement together. The Agency noted Minors "continue to demonstrate troubling behaviors, including issues around food, emotional regulation and tantrums" and were "in need of intensive mental health treatment," but it had been difficult to connect them with services because of the multiple placement changes. In June 2014, the juvenile court sustained the petitions and ordered reunification services.

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<sup>2</sup> All undesignated section references are to the Welfare and Institutions Code.

<sup>3</sup> Amended petitions alleged H.C. and G.C.'s presumed father, who they lived with from approximately 2010 or 2011 to 2013, had a pattern of cursing at and hitting them, and his whereabouts were unknown. He did not contest the termination of his parental rights and is not a party to this appeal. Mother informed the Agency she does not know the identity of A.C.'s father.

A December 2014 report stated Minors' caregiver said H.C. was "defiant and disrespectful"; G.C. "was doing well in the home" and the caregiver did not report any behavioral concerns; and A.C. was "doing very well." A February 2015 report stated Minors moved to a new placement in January because the caregiver said she had been "very sick" and "can no longer provide the level of care [H.C.] needs." Minors were placed together in a new home. At the February 2015 review hearing, the juvenile court ordered continued reunification services.

In May 2015, H.C. was moved to a new placement at the caregiver's request, because of his aggressive behaviors, including destruction of property and physical aggression toward the other children in the home, including G.C. H.C. was placed in a therapeutic foster home. Shortly before this move, H.C. started psychotropic medications for his impulsivity and aggressive behavior. H.C. was diagnosed with posttraumatic stress disorder and mood disorder not otherwise specified, ADHD, and oppositional defiant disorder. In July 2015, G.C. began psychotropic medication targeting mood volatility and aggressive behavior. She was diagnosed with posttraumatic stress disorder and mood disorder not otherwise specified. She continued to struggle with excessive tantrums. In August 2015, G.C. was moved to a therapeutic foster home because of her difficult behaviors. Although Minors were all in separate placements, they continued to have sibling visits.

Following a September 2015 review hearing, the juvenile court terminated reunification services and set a section 366.26 hearing. Mother did not file a writ challenging the termination of services.

Agency reports were filed in January and February 2016. H.C. remained in the therapeutic foster home. He was in good physical health and was making educational progress with no behavioral issues at school. He was diagnosed with posttraumatic stress disorder and unspecified disruptive and impulse-control disorder and was receiving therapy, psychiatric services, and psychotropic medication. He had made "much progress" in decreasing his verbal and physical aggression and his tantrums were less frequent, which the social worker attributed in part to the stability of his foster placement.

He was described as a “playful, talkative, and friendly nine-year-old boy” who enjoyed playing sports and spending time outdoors and was a good student who generally got along with his peers. The social worker found, “given his young age, his good overall health, his ability to manage most of his behaviors, and his ability to build a relationship with his primary caregivers, he is considered an adoptable child,” although his “behavioral issues and mental health history make it more difficult to place him in a permanent home.” The Agency recommended termination of parental rights as to H.C. be continued for six months to allow the Agency time to locate a prospective adoptive home for him.

G.C. and A.C. moved to a prospective adoptive home in September 2015. G.C. was a physically healthy, “animated, energetic, and creative seven-year-old girl” who “loves being active.” She was diagnosed with posttraumatic stress disorder and unspecified disruptive and impulse-control disorder, for which she was receiving therapy and medication. Although G.C. still had “intense episodes of aggression,” the prospective adoptive mother was committed to adopting G.C. and A.C. The social worker concluded G.C. was adoptable, given her “young age, her overall good health and development, and her ability to attach to her primary caregiver.” In January 2016, G.C. was placed in a temporary placement due to a physically aggressive tantrum involving unsafe behaviors directed at A.C. and the prospective adoptive mother. The prospective adoptive mother remained committed to adopting both G.C. and A.C. The Agency requested a sibling bonding study to determine the appropriateness of G.C. and A.C. living together. The Agency recommended terminating parental rights with respect to G.C.

A.C. was described as a “humorous, spirited, and cheery three-year-old girl” who enjoyed puzzles, books, singing, and dancing. She was building a strong bond with her prospective adoptive mother and sought her for comfort and attention. The Agency recommended terminating parental rights with respect to A.C.

At the February 2016 section 366.26 hearing,<sup>4</sup> Minors' counsel agreed with the Agency's recommendations as to all three Minors. The only witnesses were Agency social workers Angela Lalaind and Kristen Klein. Lalaind testified H.C. did not have any current behavioral difficulties at school. His aggression and tantrums had "decreased significantly" and he was "very engaged, happy, [and] affectionate towards his caregiver." His caregivers were willing to provide a long-term placement, including guardianship, but felt they were too old to adopt.

Lalaind testified G.C.'s behavioral issues, which included tantrums and physical aggression, had gotten worse over the last few months and were challenging to parent. G.C.'s prospective adoptive mother was a social worker and therapist who was experienced in working with children with behavioral issues. G.C. had been temporarily placed in respite care to allow G.C. and the prospective adoptive mother to "take a break" from each other, but the prospective adoptive mother intended for G.C. to return to her home. While G.C. has been in the respite placement, the prospective adoptive mother continued to have daily contact with her, including transporting her to therapy, extracurricular activities, and to her placement after school. G.C. considered the prospective adoptive home her "forever home" and called the prospective adoptive mother "momma." A.C. remained with the prospective adoptive mother and was doing very well in the placement.

Lalaind testified Minors had lived together for most of their lives, including being placed together for much of their dependency. At sibling visits, they were generally happy to see each other but needed prompting to play together, especially G.C. and H.C.

Klein was Minors' adoption social worker. She had more than eight years of experience as an adoption social worker for the Agency. She had successful adoptive placements with children diagnosed with posttraumatic stress disorder and unspecified disruptive and impulse control disorder. She had also successfully placed children with aggressive tantrums.

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<sup>4</sup> The hearing took place over three days in February 2016.

Klein testified H.C. “is a handsome charismatic boy. He’s friendly. He’s very spirited and bright. He’s involved in his church and is actually an usher now and very proud of that. He enjoys playing sports, talking about playing sports and spending time with the other boys that he currently resides with playing video games or other activities.” He wants a “forever family” but his current placement felt they were too old to adopt. Klein testified G.C. “has a beautiful personality. She’s cheery, funny, playful. She’s always wanting to just spark joy in anybody who’s around her wanting to play games. She’s a beautiful little girl. She’s always smiling. She’s very photogenic. Loves taking photos and is happy to either take photos of herself with your cell phone, or be in photos with her siblings, or with each other. She is friendly. Wants to make friends. She is very bright. She enjoys playing different games, reading books.” Klein testified A.C. was “a cute adorable little girl” with a “cheery personality” who was attached to her prospective adoptive mother and called her “mommy.”

Klein testified G.C. and A.C. had a sibling bond but in her opinion, their need for permanence outweighed their bond. Klein testified A.C. and H.C. seem to have a good relationship. A.C.’s caregiver reported A.C. experienced extreme grief after visits with H.C., which Klein construed as meaning that “she knows who her brother is and that she likes spending time with him. I would expect that for any three year old on my caseload.” H.C. and G.C. had a “tumultuous” relationship and would not function well in the same home. The prospective adoptive mother of G.C. and A.C. had encouraged visitation between the siblings. She had also expressed an interest in maintaining a relationship between all of Mother’s children, including possibly adopting Minors’ three younger siblings.<sup>5</sup>

The juvenile court found Minors all adoptable: “The fact that there is a [prospective adoptive] mother seeking to proceed for two of the children I think is

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<sup>5</sup> In August 2014, after Minors were removed from Mother’s custody, Mother gave birth to twin girls; a sixth child was born in December 2015. At the time of Minors’ section 366.26 hearing, all three younger siblings had been removed from Mother’s custody and had section 366.26 hearings pending.

illustrative of being adoptable kids. Certainly all three have some degree of behavioral mental health issues, but these don't appear to me to be extreme. I think they have been diagnosed. They seem addressable. They're going to take some time probably. [H.C.]'s situation is obviously a little more problematic in terms of his emotional health, but he also sounds adoptable. [¶] [Mother's counsel] cites the fact that his current caregivers are unwilling to adopt him as being a factor tending to show he's not generally adoptable. In fact, I almost take that testimony the opposite way. The fact that they are willing to maintain a long term relationship with him I think speaks to his adoptability. And as I heard several times it's primarily their age that makes them unwilling to adopt. I didn't hear anything about them feeling that he was too troubled to deal with; it was simply that whatever their age is they're not ready to take on a lifetime commitment. But the fact that they're willing to keep him long term, if that's how it plays out, I think is an additional factor in favor of his being found adoptable. [¶] . . . [T]here was a comment about [G.C.], that fact that she's in respite care at this time is a negative towards a finding of adoptability. But it was quite clear from Ms. Kl[ein]'s testimony that the [prospective adoptive] mom is still proceeding; it's just that they're having to cope with some of the problems . . . ." The court found "by clear and convincing proof, and then some, that all three children are adoptable."

The court rejected Mother's argument that the sibling bond exception applied: "[C]learly there is evidence here that the three older kids have some relationship with each other. That's not surprising. I'm glad that they do. But there is no evidence here that they are so bonded that termination of parental rights would be detrimental to them. The proposed placement here would have at least two of them in contact and allow for contact with the third. It seems like the . . . bond between them is normal, mostly positive small child bonding. But I don't see any evidence that it's so unusual or so strong to outweigh the benefits of permanence."<sup>6</sup>

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<sup>6</sup> The court also rejected Mother's argument that the beneficial parental relationship exception applied. Mother does not challenge this finding on appeal.

The court proceeded to terminate parental rights for A.C. and G.C. With respect to H.C., the court found that termination of parental rights would not be detrimental and that he is adoptable, and continued the section 366.26 hearing for 180 days.

## DISCUSSION

### I. *Adoptability*

#### A. *Legal Principles*

“The section 366.26 hearing is a critical late stage in a dependency proceeding. The child has been under juvenile court jurisdiction for an extended period following the dispositional order, and the court has held one or more review hearings to consider a return to parental custody. [Citation.] At the section 366.26 hearing, the focus shifts away from family reunification and toward the selection and implementation of a permanent plan for the child. [Citation.] Section 366.26 sets out ‘the exclusive procedures for conducting these hearings.’ [Citation.] If adoption is likely, the court is required to terminate parental rights, unless specified circumstances compel a finding that termination would be detrimental to the child.” (*In re S.B.* (2009) 46 Cal.4th 529, 532.) The finding that adoption is likely must be made by clear and convincing evidence. (§ 366.26, subd. (c)(1).)

“The issue of adoptability posed in a section 366.26 hearing focuses on the *minor*, e.g., whether the minor’s age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.] Hence, it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent ‘waiting in the wings.’ [Citations.] [¶] Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor’s age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent’s willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*.” (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649–1650.)



“We recognize that in some cases a minor who ordinarily might be considered unadoptable due to age, poor physical health, physical disability, or emotional instability is nonetheless likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child. Where the social worker opines that the minor is likely to be adopted based solely on the existence of a prospective adoptive parent who is willing to adopt the minor, an inquiry may be made into whether there is any legal impediment to adoption by that parent [citations]. In such cases, the existence of one of these legal impediments to adoption is relevant because the legal impediment would preclude the very basis upon which the social worker formed the opinion that the minor is likely to be adopted.” (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1650.)

“If the court finds that termination of parental rights would not be detrimental to the child . . . and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child . . . within a period not to exceed 180 days.” (§ 366.26, subd. (c)(3).) Although the same factors are considered as in the analysis of whether the minor is likely to be adopted, the standard is lower: “the ordinary meaning of ‘likely’ is ‘ “ ‘more probable than not,’ ” ’ ” while “ ‘a probability’ generally does *not* mean ‘ “ ‘more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.’ ” ’ ” (*In re Y.R.* (2007) 152 Cal.App.4th 99, 108–109, disapproved of on other grounds by *In re S.B.*, *supra*, 46 Cal.4th at p. 537, fn. 5; see also *id.* at p. 110 [“we conclude the Legislature did not intend ‘a probability for adoption’ to be synonymous with a finding the child is ‘likely’ to be adopted”].)

Our review of the juvenile court’s adoptability findings is for substantial evidence. (*In re I.I.* (2008) 168 Cal.App.4th 857, 871.) Because the juvenile court must find adoptability by clear and convincing evidence, there is a split of authority over whether our substantial evidence review takes that standard into account. (Compare *In re Angelique C.* (2003) 113 Cal.App.4th 509, 519 [“on appeal from a judgment required to

be based upon clear and convincing evidence, ‘the clear and convincing test disappears’ ”] with *In re Isayah C.* (2004) 118 Cal.App.4th 684, 694 [review determines “whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings *based on the clear and convincing evidence standard*”].) We need not decide the proper approach in this case because, as discussed below, we would affirm the court’s adoptability findings in either event.

B. *H.C.*

Mother first argues insufficient evidence supports the juvenile court’s finding that H.C. had a probability of adoption under section 366.26, subdivision (c)(3). We disagree.

There was evidence H.C. was “handsome,” “charismatic,” “friendly,” and “bright.” Although he struggled with severe behavioral issues, at the time of the section 366.26 hearing he had made substantial progress and the frequency of his aggressive behaviors and tantrums had decreased. Previous placements had ended because of H.C.’s behaviors, but H.C. was currently in a successful placement where the only impediment to adoption was that the caregivers felt they were too old to adopt. The Agency’s adoption social worker, who had more than eight years of experience, testified she had successfully placed children with the same mental health diagnoses as H.C. There was ample evidence supporting the juvenile court’s adoptability finding.

Mother emphasizes H.C.’s severe behavioral issues, but cites largely to earlier reports issued for the detention, jurisdiction/disposition, and review hearings while ignoring the substantial progress documented at the time of the section 366.26 hearing. She notes his current caregivers are not willing to adopt him, but fails to acknowledge the only evidence of the reason for their unwillingness had nothing to do with H.C. Mother also notes his mental health diagnoses, but ignores the evidence that the Agency social worker had successfully placed children with the same diagnoses.

Mother argues H.C. is unlike the minors in three cases in which adoptability findings were affirmed, but she identifies no similar cases in which such a finding was reversed. In any event, contrary to Mother’s contention, two of the identified cases provide support for our conclusion. (*In re Gabriel G.* (2005) 134 Cal.App.4th 1428,

1431, 1438 [probability of adoption finding affirmed for minors, including three-year-old whose “ ‘violent and aggressive’ ” behavior resulted in his foster parent and two daycare facilities requesting his removal, where there was also evidence he was “healthy, developmentally on target in most areas, and . . . physically appealing”]; *In re I.I., supra*, 168 Cal.App.4th at p. 871 [*likelihood* of adoption finding affirmed where prospective adoptive placements had been found and “despite negative behaviors, the children were all healthy,” “had no major medical issues,” and were physically attractive and “affectionate”].)<sup>7</sup>

C. G.C.

Mother contends the juvenile court’s finding that G.C. was adoptable was in error. We reject the contention.

There was evidence G.C. was “cheery, funny, playful,” “beautiful,” “always smiling,” “friendly,” and “very bright.” The Agency’s adoption social worker testified she had successfully placed children diagnosed with G.C.’s diagnoses—posttraumatic stress disorder and unspecified disruptive and impulse control disorder—as well as children with aggressive tantrums. Although G.C. had behavioral issues including severe tantrums, a prospective adoptive parent was willing and committed to adopting G.C. Substantial evidence supports the juvenile court’s finding that G.C. was adoptable.<sup>8</sup>

Mother argues G.C. is not generally adoptable, pointing to her behavioral issues, but ignores the evidence of positive attributes supporting a finding of adoptability.

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<sup>7</sup> The third case, involving a one-year-old at risk for developmental problems but otherwise generally adoptable, is inapposite. (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 215, 224.) Although Mother emphasizes the presence of a relative interested in adopting the minor in that case, that fact was not essential to the adoptability finding. (*Id.* at p. 224 [social worker testified “even if specific families had not been identified as potential adoptive placements, she believed [the minor] was ‘generally adoptable’ ”].)

<sup>8</sup> In her reply brief, Mother argues the Agency is estopped from relying on general adoptability because it relied solely on specific adoptability below. To the contrary, counsel for the Agency expressly clarified the Agency “is not seeking only specific adoptability findings for the children; the [Agency] is seeking a general adoptability finding as well.”

Contrary to Mother's suggestion, a minor does not have to be "problem-free" to be found generally adoptable. Mother also argues the prospective adoptive parent cannot be used as evidence of adoptability because she "had given [G.C.] up into respite when her behavior became too difficult and dangerous." This characterization does not reflect the evidence that the caregiver remained committed to adopting G.C. and was in daily contact with G.C. while G.C. was in respite care. Mother argues the court was obligated to consider the prospective adoptive parent's ability to meet G.C.'s needs. However, the case relied on by Mother makes clear that this consideration is only relevant where the minor "will require intensive care for life." (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1058, 1062 [minor had "cerebral palsy, severe quadriplegia, a seizure disorder, and an uncontrolled and severe psychomotor delay" and "will always require total care"].) "[A]s a general rule, the suitability of the prospective adoptive family does not constitute a legal impediment to adoption and is irrelevant to the issue of whether a child is likely to be adopted." (*Id.* at p. 1061.)

We disagree with Mother's contention that this case is similar to *In re Jerome D.* (2000) 84 Cal.App.4th 1200. In *Jerome D.*, the Court of Appeal reversed an adoptability finding where the assessment did not consider the minor's prosthetic eye, which required care and treatment; there was no evidence of approved families willing to adopt a similar child; and, while the mother's boyfriend expressed a desire to adopt, the assessment did not address his criminal and dependency history. (*Id.* at p. 1205.) In contrast, the Agency fully considered G.C.'s behavioral issues, there was a prospective adoptive parent willing to adopt G.C., and Mother cites no evidence suggesting the prospective adoptive parent had a criminal or dependency history or any other legal impediment to adopting G.C.

Finally, we reject Mother's contention that the juvenile court's order places G.C. at risk of becoming a legal orphan. "In 2005, [section 366.26] was amended to add subdivision (i)(2), which provides that if a child has not been adopted after three years following the termination of parental rights, the child may petition the juvenile court to

reinstate parental rights. [Citation.] Thus, under the current statute, there is no danger of the children becoming legal orphans.” (*In re I.I.*, *supra*, 168 Cal.App.4th at p. 871.)

## II. *Beneficial Sibling Relationship Exception*

Mother’s final argument is the juvenile court erred in finding the beneficial sibling relationship exception did not apply. We disagree.

“If the juvenile court finds the child adoptable, the juvenile court must terminate parental rights unless the court finds a ‘compelling reason for determining that termination would be detrimental to the child’ due to one or more of the statutorily enumerated circumstances. [Citation.] [¶] One such exception to adoptability applies when ‘[t]here would be a substantial interference with a child’s sibling relationship . . . .’ [Citation.] In considering whether that exception applies, the juvenile court must take into consideration whether the siblings were raised in the same home, whether they shared significant common experiences or had close and strong bonds, and whether ongoing contact outweighs the child’s interest in the benefit of legal permanence through adoption.” (*In re I.I.*, *supra*, 168 Cal.App.4th at p. 872.) The burden is on the party seeking to demonstrate the exception applies. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.) Our review is either for substantial evidence, abuse of discretion, or a combination of the two. (See *In re K.P.* (2012) 203 Cal.App.4th 614, 621–622.) Our conclusion is the same under any of these standards.

Minors had lived together for much of their lives. G.C. and A.C. had a generally good relationship; so did H.C. and A.C.<sup>9</sup> At the time of the section 366.26 hearing, a prospective adoptive mother was interested in adopting both G.C. and A.C., thereby continuing their sibling relationship. Moreover, the prospective adoptive mother for G.C.

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<sup>9</sup> To the extent Mother also relies on the relationship between G.C. and H.C., we reject the claim. The evidence showed their relationship was tumultuous and they would not function well in the same home, and Mother cites no evidence that their relationship outweighed their interest in permanence. Mother does not rely on the relationship between Minors and any of their three youngest siblings.

and A.C. exhibited a commitment to maintaining contact between the siblings.<sup>10</sup> In such circumstances, “termination of parental rights did not necessarily foreclose the continuation of the sibling relationships.” (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1014.) In any event, the juvenile court’s conclusion that the sibling relationships were not outweighed by Minors’ interest in permanence was amply supported by the evidence and was not an abuse of discretion.

#### DISPOSITION

The juvenile court’s orders are affirmed.

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<sup>10</sup> Mother argues there is no certainty visits will continue, pointing to evidence that visits had not taken place recently because of G.C.’s behavior. Contrary to Mother’s assertion, there is no evidence these visits were cancelled as punishment, but rather because the caregivers simply “haven’t had the opportunity” to arrange them.

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SIMONS, J.

We concur.

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JONES, P.J.

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BRUINIERS, J.

(A147479)